

No. 110

In The
Supreme Court of the United States

At Washington, D. C., October Term, 1965.

AMERICAN AIRLINES, INC.,

Petitioner.

v.

NORTH AMERICAN AIRLINES, INC.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

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OPINION BELOW

The opinion of the United States Court of Appeals for
the District of Columbia Circuit (Appendix to Petition
and R411-435) is not yet reported.

JURISDICTION

The judgment of the Court of Appeals was entered on June 23, 1955. (R411) No petition for rehearing was filed. The jurisdiction of this Court is invoked under 28 U.S.C., Section 1254(1).

QUESTION PRESENTED

Acting under Section 411 of the Civil Aeronautics Act of 1938, as amended, 49 U.S.C. §491 did the Civil Aeronautics Board have jurisdiction to enter an order directing respondent North American Airlines, Inc., operating in air transportation in competition with petitioner, American Airlines, Inc., to cease and desist from using the name "North American Airlines, Inc.", "North American Airlines", "North American", or any combination of the word "American"?

STATUTE INVOLVED

Section 411 of the Civil Aeronautics Act, 52 Stat. 103 (1938) as amended 66 Stat. 628 (1952), 49 U.S.C., Section 491 reads as follows:

"The [Civil Aeronautics] Board may, upon its own initiative or upon complaint by any air carrier, foreign air carrier, or ticket agent, if it considers that such action by it would be in the interest of the public, investigate and determine whether any air carrier, foreign air carrier or ticket agent has been or is engaged in unfair or deceptive practices or unfair methods of competition in air transportation or the sale thereof. If the Board shall find, after notice and hearing, that such air carrier, foreign air carrier, or ticket agent is engaged in such unfair or deceptive practices or unfair methods of competition, it shall order such air carrier, foreign air carrier, or ticket agent to cease and desist from such practices or methods of competition."

STATEMENT

Petitioner American Airlines, Inc., and its predecessor, American Airways, Inc., have engaged in air transportation since 1930. (R-662). Since April, 1951, respondent has engaged in air transportation under the names North American Airlines and North American Airlines, Inc. (R-1, 220, 309). Petitioner and respondent compete in air transportation. In a proceeding under Section 411 of the Civil Aeronautics Act, *supra*, instituted by the Board's Order of Investigation (R-3), in which petitioner was permitted to intervene (R-6-7), an order (R-229-230) was issued by the Civil Aeronautics Board directing:

"Respondent and its successors, assignees, representatives, agents, officers and employees to cease and desist from engaging in air transportation under the names 'North American Airlines, Inc.'; 'North American Airlines', 'North American', or any combination of the word 'American'."

The order of the court below reversed the order of the Civil Aeronautics Board.

ARGUMENT

i. The decision of the Court of Appeals correctly reversed the order of the Civil Aeronautics Board on the ground that that Agency, on the basis of the evidence and of the Congressional intent of section 411, was without jurisdiction to enter it.

The court correctly concluded (a) that the evidence did not support a finding that respondent's use of the words North American constituted an unfair or deceptive practice or unfair method of competition of which the Board had jurisdiction under section 411 and; (b) that the Board, under section 411 had no jurisdiction to adjudicate

questions of private rights arising in the field of trade-marks and trade names. (Appendix to Petition p. xv).

(a) The evidence in support of the Board's finding, essential to validity of its order, that "the substantial public confusion found herein is likely to continue" (R 210) as summarized on the basis of "examination of the record and exhibits" by the court below (App. to Pet. pp. iv-v); is as follows:

"(1) some North American passengers with North American tickets in their hands presented themselves at American ticket counters; (2) some people intending to meet North American passengers called American Airlines 'information' or ticket counters to ask about the arrival of North American flights; (3) some people who heard North American radio advertising of deferred payment flight plans called American Airlines for particulars as to how North American's 'fly now—pay later' program operated; (4) American offered no such plan; (4) persons having business were (a) a painter's union official who telephoned to American to protest that a sign was being painted by non-union painters but was assured this was a North American sign; (b) a hotel in Kansas City where North American had 'hotelled' its passengers sent its bill to American; (c) a radio repair service telephoned to American about a North American bill for \$13; (d) a tailor who addressed a North American tailoring charge for \$18 to American although the street number was that of North American; (5) the Post Office misdelivered to American (a) one correctly addressed envelope intended for North American; (b) the tailor bill mentioned in (4)(d) above; (c) in Burbank where both lines had ticket counters at the terminal, a witness said some 6 to 12 envelopes came to the American ticket counter but were intended for the North American counter; (6) a robbery of a North American ticket office was described in the newspapers as having occurred at American's office."

As further found by the court, there was no evidence that respondent adopted its name with intent to deceive

the public or trade upon the goodwill or business reputation of petitioner or that petitioner had been injured by respondent's operation; that respondent passed itself off as petitioner; that respondent "confused" petitioner's passengers to petitioner's disadvantage; that respondent's advertising intended to or did entice petitioner's passengers to fly on respondent or that respondent flew a single passenger who thought he was contracting to fly on petitioner or; that petitioner was harmed otherwise than by competition afforded by any irregular carrier. (App. to Pet. pp. xi-vii).

The court quoted (App. to Pet. p. v) from the dissenting opinion of Board Member Adams:

"Since American Airlines, Inc., carries approximately 5 and 1/2 million passengers each year over its system, I am not impressed with the fact that witnesses in this case (principally those employed by American Airlines itself) have testified that some confusion has existed. . . . On the contrary, I would be greatly surprised, (in view of the several million phone calls and other communications which American Airlines receives every year over and above those received from passengers which it actually carries), if there were not SOME demonstrable public confusion. . . ."

The court concluded its review of the evidence with the statement:

"In short, the public may have benefitted, so far as the record shows, and in any event, there is no demonstration that North American affirmatively acted in violation of a statute within the jurisdiction of the Board."

Court's
The Board's reference at page 20 of its Opinion (App. to Pet. p. xvii) to the recent amendment to the Civil Aeronautics Act extending the provisions of section 411 to "ticket agents" is an aid in determining the type of unfair practice or competitive method which the court concluded was of such a "public" nature as to fall within

the contemplation of section 411.¹ The evidence in this case disclosed no such situation. Included by the amendment are practices which would induce members of the public to believe that a ticket agent was an air carrier; misleading advertising as to quality and kind of service; type and size of aircraft, departure and arrival times, points served, routes followed, stops to be made and elapsed time; failure to adhere to published tariff rates; discrimination between passengers, collecting improper charges; the sale of reserved space by ticket-agents having no commitment from a carrier for such space; false representations concerning insurance coverage, "special priorities," special discounts; failure to make proper refunds. Practices of this type, as the court explained, are "each of the sort for which a public body might be expected to provide a remedy in the public interest where resort by an individual to the courts would be largely fruitless or impracticable." (App. to Pet. pp. xvii-xviii).

In further support of its position that the evidence in this case did not sufficiently support any practice prohibited by section 411, the court referred to many leading Supreme Court cases (App. to Pet. xix-xx). In general, these opinions disclose that practices forbidden by sections 5 of the Federal Trade Commission Act and consequently of a type prohibited by section 411, are those which may be presumed to have a generally adverse economic effect through ~~their~~ tendency to suppress competition or those practices, whether amounting to deception or to something less, which are contrary to established public policy. See *Federal Trade Commission v. Keppel and Bro.* 291 U.S. 304, 54 S. Ct. 423 (1934).

Reference to the recent amendment concerning ticket agents and to leading Supreme Court cases was used in part, in the court's opinion, as a yardstick against which

¹ Act of July 14, 1952. 49 U.S.C. Section 491 (1952).

to appraise the sufficiency of the evidence to establish the type of violation which section 411 was designed to prohibit. The evidence simply fell short of showing the type of situation of which the Board was given jurisdiction by that section.

(b) With respect to the proper meaning, purpose and intent of section 411, the court examined the legislative history of the Civil Aeronautics Act and of that section (App. to Pet. pp. vii-x). It concluded *inter alia* (1) that the Board "in the interest of the public," not in furtherance of the private interests of one entity as against another, was empowered to deal with unfair practices or unfair methods of competition" (App. to Pet. p. ix), and (2) "that the section, substantially identical to section 5 of the Federal Trade Commission Act," was intended to carry with it, "the body of law which had grown up around it [Section 5]."

The court then cites judicial authority for its position that it is not a proper function of the Civil Aeronautics Board, under section 411, to adjudicate private rights; that its proper function is to prevent unfair and deceptive practices and unfair methods of competition in air transportation involving a specific and substantial public interest. (App. to Pet. pp. x-xii). In private actions, not arising under statutes comparable to section 411, factors would have to be considered, the court finds, which differ from the public interest criteria which must dictate decision under section 411 (App. to Pet. pp. xii-xv). Referring to the Board's brief below, which, as the court states, points out that "petitioner's name is differentiated from intervenor only by the addition of a one syllable prefix" (App. to Pet. p. xiii), the court cites the supporting cases referred to by the Board, as well as opposing cases involving situations of the same type (App. to Pet. pp. xiii-xiv), briefly discussing the special problem raised by those involving such geographical words as: "Columbia"; "American", "United States", "Minnesota", and "Min-

"neapolis", and points out in the field of air transportation the longstanding prevalence of close similarity in carrier names. (App. to Pet. p. xv).

Referring further to litigation of the private adversary type involving name similarity, the court quotes from *Eastern Wine Corp., v. Winslow Warren Ltd.*, 137 F. 2d 955, 960 (2d Cir. 1943), cert. denied, 320 U.S. 758 (1943):

"The issue in such a case as this is 'whether an appreciable number of prospective purchasers of the goods . . . are likely to be confused. That a few particularly undiscerning prospective purchasers might be misled is not enough.'"

And further, from the Court's Opinion:

"Even in such adversary litigation between competitors, the obligation resting upon one is not to insure that every purchaser will distinguish it from its competitor, but only to use 'reasonable means to prevent confusion.' *Kellogg Co. v. National Biscuit Co.*, 305 U.S. 111, 121, (1938). 'A new competitor is not held to the obligations of an insurer against all possible confusion.' He is not obligated to protect the negligent and inattentive purchaser from confusion resulting from indifference. *Skinner Mfg. Co., v. General Foods Sales Co., Inc.*, D.C. 52 F. Supp. 432, 433, 450. It has been said that he is not required to make the market 'foolproof.' [Citing cases]. ' . . . instead, they are required only to mark or designate them in such manner that purchasers exercising ordinary care to discover whose products they are buying will know the truth and not become confused or mistaken. . . . *Life Savers Corp., v. Curtiss Candy Co.*, 182 F. 2d 2, 8 (7th Cir., 1950). See also, *McGraw-Hill Pub. Co., v. American Aviation Associates*, 73 App. D. C. 131; 117 F. 2d 293 (D. C. Cir. 1940).'"

Referring to petitioner and respondent, viewed from a private trade name standpoint, the court states:

"Phonetic differences, lack of emphasis in petitioner's use of the disputed term, possible failure of the in-

tervenor's advertising campaigns, differences in service, rates and elements of the airlines traveling public each has sought to reach, would seem to serve here to distinguish the two competing companies."

The court, partly on the basis of the foregoing, recognizing the complicated character of issues arising in such private trade-name litigation, was of the opinion that Congress, having no authority in any event, to legislate on the substantive law of trade marks, would not be likely to vest in the Civil Aeronautics Board authority to decide such cases. (App. to Pet. p. xvi).

This proceeding has in fact been conducted from its inception as one to enforce a private right of petitioner. At the hearing before the Civil Aeronautics Board that agency introduced no evidence whatsoever. All evidence was introduced by petitioner. Petitioner alone seeks review by this court. Neither the Board nor the Attorney General is supporting or opposing certiorari. The court below was clearly correct in holding that the Board has no jurisdiction over cases involving private rights in the field of trade marks.

2. The court below did not hold that a violation of section 411 required a showing of (1) "deliberate intention to deceive" or a "palming off" (Petition, p. 18), or (2) "injury to competitor" (Petition, p. 21).

The court below examined the record and reviewed the evidence (App. to Pet. p. iv, vi). It found *inter alia* that there was no evidence of intent to deceive the public, of "palming off", or of injury to petitioner. Entirely on the basis of the fact that there was no such evidence petitioner has somehow arrived at the conclusion that the court has held that it was essential, i.e., that proof of "deliberate intent to deceive," "palming off" (Pet. p. 18) and injury to a competitor (Pet. p. 21) are essential to proof of violation of section 411. The position of the

court below could hardly have been less aptly analyzed or more inaccurately interpreted. Throughout its opinion the court proceeds on the thesis that section 411 is concerned with a specific and substantial public interest, i.e., generally, injury or damage to the public. It was in developing the failure of the evidence to meet this test that the court reviewed it. That this was the court's purpose is quite apparent from its entire opinion; but more specifically, it concludes the very paragraph containing everything on which petitioner relies with these words:

"In short the public may have benefited so far as the record shows. . . ." (App. to Pet. p. vii)

There is nothing in the opinion of the court below to support petitioner's contention that that court has held that a violation of section 411 requires proof of intent to deceive, "palming off" or injury to a competitor.

CONCLUSION

The decision of the court below is correct. The petition for a writ of certiorari presents no question warranting further review and should be denied.

Respectfully submitted,

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October 31, 1955